No. 91-

In the Supreme Court of the United States

OCTOBER TERM, 1991

JOSE E. APONTE, ETC., ET AL.,
PETITIONERS,

v.

NORMA IRIS HIRALDO CANCEL, ET AL.,
RESPONDENTS.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Certiorari should be issued in this case to consider the following questions:

1. Whether, in a case arising under 42 U.S.C. § 1983, in which plaintiffs alleged that their dismissals from public employment were motivated by their political affiliation, the fact that their appointments are null and void under state law, and that said law mandates their dismissal is relevant to the resolution of their first amendment claims, and may therefore form the basis of a defense for the government under *Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977).

2. Whether, in a case arising under 42 U.S.C. § 1983, in which plaintiffs alleged that their dismissals from public employment were motivated by their political affiliation, and in which the defendants raised as a defense that plaintiffs' appointments were null and void pursuant to valid state law, the trial court had the duty to provide specific instructions that adequately apprise the jury of the applicable provisions of state law.

LIST OF PARTIES

The parties to the proceedings below were the petitioners, the Municipality of Carolina of the Commonwealth of Puerto Rico, and Jose E. Aponte, Mayor of the Municipality of Carolina, and respondents, Norma Iris Hiraldo-Cancel, Gladys Hiraldo-Cancel, Yolanda Allende-Lind, Aura Gonzalez, Everydith Conde, Carmen Marquez, Judith Monzon, Luis Felipe Rodriguez and Fermin Marengo-Rios.

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Petitioners, Jose E. Aponte, Mayor of the Municipality of Carolina, and the Municipality of Carolina of the Commonwealth of Puerto Rico, hereby respectfully petition that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, so entered in the above entitled proceeding on February 4, 1991.

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit of February 4, 1991 is reported at 925 F.2d 10 (1st Cir. 1991). Appendix A. The May 13, 1991 Order denying the petition for rehearing and the suggestion for rehearing *en banc*, is attached as Appendix B.

Jurisdiction Of The Court

The judgment of the court of appeals was entered on February 4, 1991. A petition for rehearing and suggestion that the case be reheard *en banc* was subsequently filed. On May 13, 1991, the petition and suggestion was denied. Upon an application for an extension of time within which to file a petition for writ of certiorari, Mr. Justice Souter, on July 13, 1991 signed an order extending the time to and including September 10, 1991. Upon a further application for an extension of time within which to file the petition, Mr. Justice Souter, on September 3, 1991, signed an order extending the time to and including September 20, 1991. The petition for a writ of certiorari is being filed pursuant to 28 U.S.C. § 1254(1).

Provisions Of Law Involved

AMENDMENT I

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

P.R. Laws Ann. tit. 3 § 1333

The text of this statute is provided as Appendix F.

P.R. Laws Ann. tit. 3 § 1337

§1337. Prohibition

For the purpose of guaranteeing the faithful application of the merit principle in public service during the period before and after elections, the authorities shall abstain from making any movement of personnel involving areas essential to the merit principle, such as appointments, promotions, demotions, transfers and changes in the category of the employees.

This prohibition shall comprise the period of two months before and two months after General Elections are held in Puerto Rico. In the case of municipalities, it shall be understood that the prohibition extends until the second Monday of January after said General Elections.

Exceptions may be made to this prohibition for urgent needs of the service, upon approval by the Director, pursuant to the standards established by the regulations.

Statement Of The Case

This petition for a writ of certiorari presents very important questions for the Commonwealth of Puerto Rico, as well as for the states and other local entities. In this case, a newly-elected

mayor of a municipality was faced, upon taking office, with a chaotic situation in the administration of personnel caused chiefly by pervasive and blatant illegalities in the recruitment of personnel. In compliance with the provisions of valid Puerto Rico law, the mayor dismissed those employees who had been illegally hired. The mayor's efforts to remedy the situation and effect compliance with the laws that he had sworn to uphold have been thwarted by the decision issued in the above referenced case by the Court of Appeals for the First Circuit. In the name of the First Amendment, both the district court and the court of appeals have unwarrantedly crippled valid laws enacted by the Puerto Rico legislature to establish and preserve a merit system for the public employment sector of Puerto Rico. In open conflict with the views of other courts of appeal, the First Circuit distorted the method of analysis and rule of causation set forth by this Honorable Court in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), by holding that state law is irrelevant to first amendment claims. The court of appeals also debilitated the holding of *Mt. Healthy*, affecting not only the interests of the Commonwealth of Puerto Rico, but also establishing an unfortunate precedent binding all the states within the jurisdiction of said court.

This is a case in which plaintiffs have alleged that they were dismissed from their employment in the public sector by the defendants because of their political affiliation, in alleged violation of their rights under the first, fifth and fourteenth amendments. Plaintiffs filed their complaint on February 25, 1986. The defendants are the Municipality of Carolina and Jose E. Aponte, Mayor of said municipality since 1985. The defendants raised various defenses throughout the proceedings, of which the most important was that plaintiffs had been hired in contravention of Puerto Rico law,[1] that, pursuant to

[1] For instance, the appointments of plaintiffs Gladys Hiraldo Cancel, Yolanda Allende Lind and Luis Felipe Rodriguez were made during the statutory electionary prohibition period in violation of the law, *infra*, p. 6, a

said law, their appointments were null and void, and that therefore they would have been dismissed regardless of their political affiliation because their dismissal was mandated by law.

Before we dwell on the procedural events of this case, we must pause briefly to explain the provisions of Puerto Rico law involved. On October 14, 1975, the Legislature of Puerto Rico approved the Puerto Rico Civil Service Personnel Act, P.R. Laws Ann. tit. 3 § 1301 *et seq*. The purpose of this act was to establish, and sustain, the merit system as the paramount principle governing the administration of personnel in the Puerto Rico government. P.R. Laws Ann. tit. 3 § 1311. One of the areas deemed essential for the protection of the merit principle is the recruitment and selection of candidates for public employment. P.R. Laws Ann. tit. 3 § 1331. In order for the recruitment of any employee to comply with the merit principle, it must meet, among others, the following requirements:

> 1) The employment opportunity must be published;
> 2) all persons appointed to public service must meet the minimum requirements set for the position;
> 3) each candidate must be tested or evaluated in fair competition with the others candidates;
> 4) a list of eligible candidates must be certified, containing the names of the most qualified persons for the position;
> 5) the selected candidate's name must appear in the certified list; and,

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fact which arises from documentary evidence and is undisputed. In the cases of Mrs. Allende and plaintiff Fermin Marengo, plaintiffs' own expert witness concluded that they would have to be dismissed under Puerto Rico law. Plaintiff Aura Gonzalez openly admitted that she did not meet the minimum requirements of her position. All of the remaining plaintiffs were dismissed in part for not meeting the minimum requirements of their position. These facts are easily ascertainable from documentary evidence or the admissions of plaintiffs and their witnesses, and require no assessment of credibility.

> 6) the selected person must satisfactorily complete a probationary period before becoming a regular employee.

P.R. Laws Ann. tit. 3 § 1333. (See Appendix G for full text of statute).

Another very important provision that is germane to the present case is the one establishing a prohibition upon personnel transactions during the electionary period. This statute, commonly known as the "Veda Electoral", prohibits any personnel transaction affecting areas essential to the merit principle, such as appointments, promotions and changes in the category of employees during a period beginning two months before general elections are held, and the second Monday of January after those elections are held, in the case of municipalities. P.R. Laws Ann. tit. 3 § 1337. Finally, municipalities are considered to be Individual Administrators under the Personnel Act. P.R. Laws Ann. tit. 3 § 1343(2). Individual Administrators are obliged to adopt regulations regarding the essential areas to the merit system which comply with the applicable provisions of the Personnel Act. P.R. Laws Ann. tit. 3 § 1347.

It is evident from the above-cited law, that the Municipality of Carolina is subject to compliance with the merit principle in recruiting its personnel, and thus must follow the strict procedures described therein, which have been carefully designed by the Puerto Rico Legislature to protect the merit system. Should these procedures be breached, the following provision of the Civil Code of Puerto Rico, approved in 1902, invalidates the recruitment action:

> "Acts executed contrary to the provisions of law are void except when the law preserves their validity."

P.R. Laws Ann. tit. 31 § 4.

The Supreme Court of Puerto Rico has consistently upheld the laws that have been quoted above, holding that violations

of the Puerto Rico Personnel Act carry as a consequence the nullity of the appointments involved, and the dismissal of the employees illegally hired. In the case of *Ortiz* v. *Mayor of Aquadilla*, 107 P.R. Dec. 819, 7 Official Translations 890 (1978), the Supreme Court stated that the extension of an employee's appointment during the electionary period, in violation of the Personnel Act was nuil and void and that his dismissal was mandated. *Ortiz*, 7 Official Translations at 895. (Appendix F). This interpretation of the Personnel Act has been sustained in later cases by the Supreme Court of Puerto Rico. *See*, *Franco* v. *Municipality of Cidra*, 113 P.R. Dec. 260, 13 Official Translations 334 (1982); *Estrella* v. *Municipality of Luquillo*, 113 P.R. Dec. 617, 13 Official Translations 797 (1982); *Colon* v. *Mayor of the Municipality of Ceiba*, 112 P.R. Dec. 740, 12 Official Translations 932 (1982).

Having succinctly exposed the relevant provisions of Puerto Rico law, we shall now return to the procedural events of the present case. After various proceedings in this case, a trial by jury commenced on June 15, 1988, and lasted for ten working days. Defendants presented overwhelming, objective, uncontradicted and unimpeached evidence that the appointments of all the plaintiffs had been made in breach of various provisions of the Puerto Rico Personnel Act, namely, that they were appointed to their positions without having met the minimum requirements for those positions, without competing for them, without approving a probationary period, or were appointed during the electionary prohibition period, or a combination of some or all these violations. At the last day of trial, the district court issued its instructions to the jury, omitting an instruction requested by the defendants on the Puerto Rico law regarding the nullity of appointments. Upon the defendants' objection to the omission of the instruction, the district court stated that the instruction was not issued because it understood that the evidence did not warrant it. (See Appendix E).

Without the guidance of the instruction on Puerto Rico law, the jury returned a verdict for plaintiffs on their first amendment claims, and also awarded punitive damages, for a total amount of approximately $372,000.

Defendants appealed to the United States Court of Appeals for the First Circuit. Three issues were raised on appeal: 1) that the judgment was erroneous in light of the doctrine established in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), and the evidence presented at trial; 2) that the district court incorrectly instructed the jury on Puerto Rico law; and, 3) that the district court abused its discretion in ordering the reinstatement of the prevailing plaintiffs. Great emphasis was placed by defendants on the overwhelming, objective, uncontradicted and unimpeached evidence presented at trial that the appointments of all the plaintiffs had been made in breach of various provisions of the Puerto Rico Personnel Act, and that the Municipality of Carolina had established, and was still following, a policy of strict compliance with the provisions of Puerto Rico law. It was also shown that all of the appointments made by the defendants have fully complied with Puerto Rico law. In light of this evidence, which stood uncontroverted and unimpeached, and in view of the clarity of Puerto Rico law, defendants argued that no reasonable jury would have found for the plaintiffs. Defendants also argued that the lack of an instruction regarding the nullity, under Puerto Rico law, of appointments of public employees made in violation of the Personnel Act rendered the jury unable to properly understand the contention of defendants.

On February 25, 1991, the First Circuit affirmed the judgment of the district court. The First Circuit did not explain how did plaintiffs' scant evidence allegedly contradict the *Mt.*

Healthy argument raised by defendants, nor did it make reference to a single piece of evidence that could contradict the uncontroverted and unimpeached evidence that plaintiffs' appointments were violative of the law, that the defendants were strictly complying with the law, and that therefore plaintiffs would have been dismissed regardless of their political affiliation. The First Circuit stated that, although defendants were entitled to adequate jury instructions, they were not entitled to the exact ones requested, and erroneously found that the instructions actually given adequately informed the jury of Puerto Rico law. The court of appeals also stated, erroneously, that the jury instructions on Puerto Rico law were "irrelevant" to the plaintiff's first amendment claim, basing itself on its holding in a previous case, *Santiago-Negron* v. *Castro Davila*, 865 F.2d 431 (1st Cir. 1989). Finally, the First Circuit rejected the defendants' arguments that reinstatement was not proper in this case.

On February 22, 1991, defendants presented before the First Circuit a petition for rehearing, with suggestion that the case be reheard *en banc*. In that petition, defendants argued that the court of appeals had misapplied the analysis established in *Mt. Healthy*, that it had incorrectly discarded as "irrelevant" to first amendment claims the provisions of valid state law, and that the decision had, for all practical purposes, nullified the provisions of Puerto Rico law and created a special class of public employee who may not be dismissed, regardless of the illegality of his appointment, if he is affiliated to a political party different from that of the government officials. The court of appeals denied this motion on May 13, 1991.

Reasons For Granting This Petition

A. The Decision Issued By The Court Of Appeals In This Case Is Contrary To The Opinion Issued By This Honorable Court In The Case Of *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977).

1. *The Court of Appeals failed to properly follow the method of analysis established for first amendment cases in* Mt. Healthy.

The holding reached by the First Circuit in this case is very simple: in cases where the plaintiffs allege that they were dismissed because of their political affiliation, in violation of their rights under the first amendment, the fact that their appointments are null and void under state law, and that said law mandates their dismissal, is irrelevant to the resolution of the first amendment claim, and therefore may not form the basis of a defense under *Mt. Healthy* v. *Doyle*, *supra*. We submit, most respectfully, that this holding contravenes the decision issued by this Honorable Court in *Mt. Healthy*.

The question presented here requires a thorough analysis of the opinion issued by this Court in the case of *Mt. Healthy*. The plaintiff in that case was a teacher who did not have tenure in the school district where he had worked under yearly contracts. In 1971, the school district decided not to renew Doyle's contract. Among the various reasons adduced by the school district for non-renewal of the contract, there was a telephone call Doyle made to a radio station, in which he criticized the school principal's proposal for a teacher dress code. *Mt. Healthy*, 429 U.S. at 282. Doyle sued the Board of Education in Federal Court, alleging that the non-renewal of this contract violated his rights under the first and fourteenth Amendments to the United States Constitution. After a bench trial, the District Court held that Doyle was entitled to rein-

statement with backpay, and the United States Court of Appeals for the Sixth Circuit affirmed. *Mt. Healthy*, 429 U.S. at 276.

In its opinion, this Court confronted, among other questions, the issue of whether the fact that Doyle's protected conduct played a substantial part in the Board's decision not to renew his contract would necessarily amount to a constitutional violation justifying remedial action. *Mt. Healthy*, 429 U.S. at 285. In answering in the negative, the Court expressed its concern that a rule of causation that focuses only on whether the protected conduct of a public employee played a substantial part in the government's decision could place the employee in a better position as a result of his protected conduct than he would have occupied had he done nothing. *Mt. Healthy*, *supra*. Finding that the constitutional rights of a public employee are sufficiently vindicated if said employee is placed in no worse a position than if he had not engaged in the protected conduct, this Honorable Court devised a new rule of causation for these cases. The plaintiff must first show that his conduct was constitutionally protected, and that the conduct was a "substantial" or "motivating" factor in the adverse decision by the public employer. The public employer is then entitled to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. *Mt. Healthy*, 429 U.S. at 287.

The rule of causation established by this Honorable Court in *Mt. Healthy* was refined in the opinion rendered in the case of *Givahn* v. *Western Line Consolidated School District*, 439 U.S. 410 (1979). In *Givahn*, the Court clarified that a plaintiff would only prevail if the defendant's decision would not have been taken "but for" the plaintiff's protected conduct. *Givahn*, 439 U.S. at 417.

In its opinion in the present case, the First Circuit rejected the defendants' argument that the plaintiffs would have been dismissed regardless of their political affiliation because their appointments had been illegally made, were therefore void

under Puerto Rico law, and the defendant had to dismiss the plaintiffs if he was to comply with and enforce the law. The court of appeals, however, completely sidestepped defendants' arguments, supported by uncontradicted and objective evidence, and instead rejected defendants' contentions as follows:

> The jury verdicts for plaintiffs were based on ample evidence that defendant Aponte (1) knew plaintiffs were affiliated with NPP, (2) vowed to rid the Carolina government of NPP members, (3) gave instructions to 'chop off the heads of the NPP members', and (4) told municipal employees to switch to the PDP. As the jury rationally found that plaintiffs would not have been discharged when they win, 'but for' their political affiliation, the denial of judgment n.o.v. did not constitute error.

Hiraldo-Cancel v. *Aponte*, 925 F.2d at 12. (Citation omitted).

We contend, most respectfully, that the analysis made by the First Circuit of the evidence presented by plaintiffs and defendants under the light of *Mt. Healthy* is very faulty. The evidence presented by the plaintiffs could perhaps be sufficient to satisfy the first two prongs of the *Mt. Healthy* test, i.e., that their protected conduct was a motivating factor in their dismissals. However, the Court of Appeals went directly from that evidence to a judgment for plaintiffs without carefully examining the nature of the *Mt. Healthy* defense presented by the defendants. This approach was faulty because *Mt. Healthy* clearly states that the defendants are entitled to show that they would have dismissed plaintiffs regardless of their protected conduct. Defendants presented abundant, uncontroverted, objective and unimpeached evidence that plaintiffs had been hired in violation of Puerto Rico law, and that said law mandated their dismissal, regardless of their political affiliation.

The problem with the analysis performed by the court of appeals is that the evidence presented by plaintiffs goes no-

where to disprove the arguments of defendants. Plaintiffs could not refute that their appointments were made in contravention of various provisions of the Puerto Rico Personnel Act. Neither could they refute that the law mandated that all their appointments be terminated. In this case the court of appeals simply used the exact same evidence to analyze all the prongs of the *Mt. Healthy* test, without considering whether the showings made by plaintiffs actually contradicted the defense raised by the defendants. The court of appeals, for all practical purposes, found for plaintiff upon the mere showing that their political affiliation had been a motivating factor in their dismissal, and refused to consider the last prong of the *Mt. Healthy* test; that is, that since objective, uncontradicted and unimpeached evidence established that all of plaintiffs' appointments were null and void, and Commonwealth law mandated their dismissal, they would have been dismissed regardless of their protected conduct under the first amendment. Defendants assert, most respectfully, that this is the precise conduct that this Court rejected in *Mt. Healthy*, and that the decision of the court of appeals should, likewise, be reversed.

In totally disregarding defendants' evidence and holding that the provisions contained in Puerto Rico's Personnel Act and its Civil Code are irrelevant to plaintiff's first amendment claims, the First Circuit has eviscerated the holding of this Honorable Court in *Mt. Healthy* and its progeny. It has, in effect, created a new breed of "untouchable" public employees who, regardless of the blatant illegality of their appointments, are now immune from dismissal and cannot be made to comply with state law. This cannot be condoned.

2. *The results of the decision rendered by the court of appeals are contrary to the rationale and purposes expressed by this Honorable Court in adopting the rule of causation for first amendment cases in* Mt. Healthy.

As defendants have shown, the decision of the First Circuit in this case misapplies the test established by this Honorable Court in *Mt. Healthy*, with the result that objective and overwhelming evidence that plaintiffs would have been dismissed regardless of their political affiliation because Puerto Rico law mandating their dismissals was ignored altogether. It is most respectfully submitted, however, that this is not the worst consequence of the decision of the court of appeals, for this decision also cuts against the purpose and rationale expressed by this Court in *Mt. Healthy*.

We must recall, from our prior discussion of *Mt. Healthy*, the concern expressed by this Court that plaintiffs suing under the first amendment could enjoy a windfall from their protected conduct, by ending up in a better position than the one they would have occupied had they done nothing. Although the rule of causation in *Mt. Healthy* was carefully designed to prevent this result, the same is blatantly present in this case.

It stands uncontroverted that plaintiffs were all appointed in violation of the Puerto Rico Personnel Act. It is also settled under Puerto Rico law that these appointments have no validity whatsoever and that they are illegal. However, due to the holding of the court of appeals, the plaintiffs now enjoy a permanent, untouchable status, solely by virtue of having a different political affiliation than that of the governmental officers. This is precisely the kind of result that this Court sought to prevent in *Mt. Healthy*.

B. THE DECISION REACHED BY THE COURT OF APPEALS FOR THE FIRST CIRCUIT IS IN CONFLICT WITH THE DECISION OF OTHER UNITED STATES COURTS OF APPEALS, IN MATTERS NOT YET RESOLVED BY THIS HONORABLE COURT.

The rule of causation established by this Honorable Court in *Mt. Healthy*, and refined in *Givahn*, has been applied on various later occasions by this Court, and interpreted and applied in hundreds of occasions by the United States Courts of Appeals. The present case, however, is unusual in that the reason adduced by defendants for the dismissal of plaintiffs was not discretionary in nature, but the dismissals were instead mandated by valid state law. An extensive research on this issue yielded no cases from this Honorable Court and only a few decisions by the courts of appeals, in which such reasons were involved. However, all the courts of appeals which have confronted such reasons have found for the defendants, except the Court of Appeals for the First Circuit. There is therefore a conflict among the circuits which should be resolved by this Honorable Court.

In the case of *Winters* v. *Lavine*, 574 F.2d 46 (2nd Cir. 1978), the plaintiff was an applicant for Medicaid benefits who challenged the constitutionality of a New York medicaid statute that was allegedly being construed to exclude Christian Science treatment from coverage. The United States Court of Appeals for the Second Circuit found that under *Mt. Healthy*, the state had advanced a constitutionally permissible reason for not granting plaintiff's request for benefits, in that she did not advance sufficient proof regarding the nature of her illnesses or her treatments. *Winters*, 574 F.2d at 65. The court of appeals explained that, under New York's medicaid statute and regulations, the defendants had no discretion to grant the plaintiff the benefits she requested in the absence of adequate proof of entitlement to benefits, and that the state courts of New York had held that, without adequate proof, the defendants could not authorize payments. *Winters*, 574 F.2d at 66, n.21.

In the case of *Ledford* v. *Delancey*, 612 F.2d 883 (4th Cir. 1980), the plaintiff was a Social Work Trainee at the Forsyth County Department of Social Services, a position which he held on a probationary basis. Plaintiff was dismissed because of "inadequate job performance." *Ledford*, 612 F.2d at 885. He alleged, however, that he was discharged because of his speech, critical of his employer, regarding the living conditions of the persons he served. After Ledford's dismissal, however, the defendant found that the plaintiff lacked a college degree, which was required for the position he had held. The district court, on that basis, dismissed plaintiff's claims under the first amendment and the due process clause of the fourteenth amendment.

The United States Court of Appeals for the Fourth Circuit affirmed the dismissal of plaintiff's claims, even though the plaintiff's lack of qualifications for the position did not come to the attention of the defendant until after he was dismissed. In affirming the dismissal, the Court of Appeals stated as follows:

> [W]hen, as here, the plaintiff seeking reinstatement has no legitimate right to the job whatsoever, the usual practice need not be followed. Here, the newly discovered reason for termination is not merely another asserted basis for suggestion that plaintiff had failed to perform his duties. It strikes at the core of any asserted right to have the job at all. It conclusively demonstrates that he is legally precluded from having this job, and that, under *Mt. Healthy*, plaintiff could, and would, have been terminated even in the absence of any protected conduct.

Ledford, 612 F.2d at 886.

The Court of Appeals for the Fourth Circuit followed the reasoning advanced in *Ledford* in the later case of *Jurgensen* v. *Fairfax County, Virginia*, 745 F.2d 868 (4th Cir. 1984), albeit on different facts. In *Jurgensen*, the plaintiff, a public employee, was demoted for releasing a departmental inspection report to the public in violation of departmental regulations.

The plaintiff filed suit under 42 U.S.C. § 1983, alleging that his first amendment right to free speech was violated.

In *Jurgensen*, there was no controversy that the plaintiff's demotion was caused by the release of the departmental inspection report in violation of departmental regulations. The court of appeals, however, stated that the first issue in the case did not relate to the report or its contents, but on whether the regulations violated by the manner in which the plaintiff released the report were valid. The court of appeals explained that:

> This is so because a demotion of an employee resulting from a violation of a valid regulation governing his employment would not satisfy the second requirement of *Mt. Healthy*, that the exercise by the employee of his right of free speech was the 'but for' cause of his demotion.

Jurgensen, 745 F.2d at 881-882.

The Court of Appeals for the Fourth Circuit has therefore established that, in its jurisdiction, a defendant in a suit under the first amendment will prevail, pursuant to *Mt. Healthy*, if its employment decision is either mandated by state law, or is based on the plaintiff's violation of valid state law.

The United States Court of Appeals for the Fifth Circuit has also confronted this issue in the case of *Smith* v. *Price*, 616 F.2d 1371 (5th Cir. 1980). In this case, a policeman was dismissed from the Athens City Police Department for violating various regulations. The policeman sued, alleging that he had been dismissed for having an extramarital love affair, in violation of his right to freedom of association under the first amendment. The district court awarded Smith backpay, reinstatement, attorney fees and other remedies.

The Court of Appeals for the Fifth Circuit reversed, on the grounds that the plaintiff had violated at least three valid regulations of the police department, and that each of the three

offenses, by itself, would have warranted the dismissal of the plaintiff. *Smith*, 616 F.2d at 1377. These violations were not reporting the theft of his gun by his lover, his involvement in incidents outside his line of duty which resulted in breaches of the peace, and on-duty visits to his lover's house without notifying the dispatcher of his location. *Smith*, *supra*. The gravity of each of these incidents overrode the rights of plaintiff in freedom of association and warranted his dismissal pursuant to *Mt. Healthy*.

The United States Court of Appeals for the Eleventh Circuit had the opportunity to address the issue presented in this petition in the case of *Hamm* v. *Members of Board of Regents of State of Florida*, 708 F.2d 647 (11th Cir. 1983). The plaintiff was an equal opportunity specialist at the University of South Florida in Tampa, and was transferred from her position. She sued the defendants, alleging that her transfer was made in retaliation for her speech. The district court dismissed her complaint. She appealed.

The Court of Appeals for the Eleventh Circuit affirmed the dismissal. It had found that the University had upgraded the position of equal opportunity specialist to the category of administrative and professional positions, and this upgrading had been approved by the state. Since plaintiff lacked the college degree that was necessary for the upgraded position, the university was found to have been justified in laterally transferring the plaintiff and hiring a qualified person for the position. *Hamm*, 708 F.2d at 653.

In the related context of a case brought under Title VII of the Civil Rights Act of 1964, in the case of *Darnell* v. *City of Jasper, Alabama*, 730 F.2d 653 (11th Cir. 1984), the Eleventh Circuit again established, as a prerequisite for a right to public employment, that the employee qualify for his position. The plaintiff in *Darnell* was denied the opportunity to take a civil service examination, and he sued the defendants under the related provisions of Title VII of the Civil Rights Act of 1964. The district court dismissed the complaint.

The Court of Appeals for the Eleventh Circuit reversed, finding that the district court had erred in denying the remedy of ordering the administration of the exam of the plaintiff; however, it stressed that the other remedies available under Title VII were contingent to plaintiff's passing the exam and meeting other qualifications of the position he sought. *Darnell*, 730 F.2d at 656. The court of appeals also stated that, if plaintiff failed the test, he would not be entitled to any back pay under Title VII because the failure of an objectively administered exam would indicate that the plaintiff would not have been hired even in the absence of discrimination. *Darnell*, 730 F.2d at 656, n.4.

From the cases described above, we submit, most respectfully, that is is apparent that the circuits that have confronted situations similar to the one in the case at bar have adopted a radically different approach towards the *Mt. Healthy* defense, than the one adopted by the First Circuit. Like the cases that have been described above, the present case involves a situation in which the plaintiffs have all been hired in violation of valid state law, in this particular case the laws of Puerto Rico that regulate the recruitment of public personnel. Also in those circuit cases, it was not a discretionary matter for defendants whether plaintiffs should be dismissed or not for their failure to comply with valid law. Plaintiffs' appointments were null and void, and the defendants were bound by Puerto Rico law to terminate those appointments. The Courts of Appeals for the Second, Fourth, Fifth and Eleventh Circuits have recognized that when state laws or regulations mandate the actions of the governmental officers, that conclusively shows that those officers would have performed those actions against the involved employees even in the absence of the protected conduct. The Court of Appeals for the First Circuit, however, has refused to recognize the important role of state law as a basis for a *Mt. Healthy* defense in first amendment cases.

Another, even more striking difference between the approach taken by Courts of Appeals for the Second, Fourth,

Fifth and Eleventh Circuits and the Court of Appeals for the First Circuit, is shown by the statement made by the latter court that the nullity of plaintiffs' appointments under Puerto Rico law is irrelevant to their first amendment claims. The First Circuit stands alone in making such a statement, against the better criterion of the remaining circuits. The seriousness and gravity of the position assumed by the First Circuit is exemplified by the fact that the present case does not represent an isolated instance, but is instead a reiteration of what is now an established doctrine in the First Circuit.

The First Circuit's statement that state law is irrelevant to a plaintiff's first amendment claims first appeared in the case of *Santiago-Negron* v. *Castro-Davila*, 865 F.2d 431 (1st Cir. 1989). In that case, the appealing defendants, officers of the Municipality of Las Piedras, Puerto Rico, dismissed the plaintiffs upon attaining power in 1985. The plaintiffs sued under 42 U.S.C. § 1983, alleging that their dismissals were due to their political affiliation. After a jury trial, the plaintiffs were awarded compensatory damages, punitive damages and reinstatement.

The defendants appealed. On appeal, the First Circuit, among other issues, discussed the instructions given to the jury in the case. Like in the present case, one of the defenses raised by defendants was that none of the plaintiffs had been hired in accord with Puerto Rico law, and that their appointments were thus null and void under that law. Accordingly, defendants requested an instruction regarding the nullity of plaintiffs' appointments. The district court refused to give the requested instructions. In denying defendants' argument that the jury instructions requested should have been read, the Court of Appeals stated the following:

> Plaintiffs were hired by the Municipality, worked for it and were paid by it. Regardless of whether they were in accord with the personnel laws of Puerto Rico, they were municipal employees. We do not think that a new admin-

> istration can use the 'nullity' of appointment doctrine as a cover for discharges, transfers, and discrimination based solely on political affiliation. The instructions given on the applicability of the personnel laws of Puerto Rico were, therefore, irrelevant to the first amendment claim. If irrelevancy connotes error, the error was harmless.

Santiago-Negron, 865 F.2d at 436.

The expressions cited above are incorrect as a matter of law. Not only are they in clear conflict with the holdings of other courts of appeals which we have summarized, but they also cut against the grain of this Honorable Court's admonition in *Mt. Healthy* that a plaintiff ought not obtain as a result of the exercise of protected conduct something he had no right to have in the first place. The First Circuit has totally disregarded this admonition, adopting the novel theory that when confronted with first amendment claims state or local law has no relevancy. As a result, an employee hired in breach of state law may now, under the guise of the first amendment, be able to obtain something which would otherwise be unattainable for him.

In *Santiago-Negron*, the First Circuit drew support for its conclusion from statements made by this Honorable Court in *Perry* v. *Sinderman*, 408 U.S. 593, 597-98 (1972) and *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6, to the effect that the lack of a reasonable expectation of continued employment is insufficient to justify a dismissal based solely on an employee's private political belief. *Santiago-Negron*, 865 F.2d at 436. Although it is settled that state law is not controlling in the area of first amendment law, this is a far cry from the position, assumed by the First Circuit, that state law is entirely irrelevant to first amendment claims. This position is a novel one, is in clear conflict with the position adopted by four other Circuits, and, more importantly, is wrong as a matter of law, misreads Supreme Court precedents, and rewards those who have acted in contravention of state law. As has been discussed pre-

viously in this petition, state law is relevant to discrimination actions of any type and can be used as part of a *Mt. Healthy* defense. This position is correct as a matter of law, as well as a matter of pure logic, for a defendant can hardly be found to have violated plaintiffs' rights when the personnel action taken by him is mandated by state law, and the defendant would violate that law if he did not take such action.

In light of the above, defendants most respectfully submit that this Honorable Court should issue the writ requested in this petition to clarify the role that state law may play in First Amendment cases, particularly regarding the value it has in supporting a defense raised under *Mt. Healthy*.

C. The Court Of Appeals Erred In Sustaining The District Court's Refusal To Instruct The Jury On The Provisions Of Puerto Rico Law Regarding The Nullity Of The Appointments Of Plaintiffs, Therefore Depriving Defendants Of A Fair Chance To Show That They Would Have Dismissed Plaintifs Regardless Of Their Political Affiliation.

Another question presented in this petition concerns the propriety of the instructions given to the jury in this case. The precise question is whether the district court should have provided specific instructions regarding the nullity of public personnel appointments made in violation of Puerto Rico law. Defendants filed before the district court a motion submitting proposed jury instructions (Appendix C), among which the following was included:

> Puerto Rican law establishes a series of mechanisms such as eligibility rosters, recruitment and selection procedures, competition requirements, taking an oath, etc. These requirements stem from the need of making the employee selection process as fair and equitable as possible in order to employ the best qualified persons. Under

> the applicable personnel regulations regarding selection of personnel, if those regulations are not followed, the appointments are illegal and void and said employees are subject to summary dismissals.

The district court did not read to the jury the proposed instruction. When defendants objected to the omission, the district court denied the objection. The First Circuit, on this issue sustained the district court's denial to read the instructions regarding nullity of appointments. The First Circuit adduced two reasons for its finding: 1) that the instruction given adequately presented the defendants' claims under the Puerto Rico Personnel Act, and the defendants were not entitled to the exact language requested; and, 2) that instructions on the applicability of the personnel laws of Puerto Rico are "irrelevant" to the first amendment claim. *Hiraldo-Cancel*, 925 F.2d at 13. For the reasons that we shall set out below, we most respectfully understand that the First Circuit misjudged the importance of the requested instructions on Puerto Rico law. In so doing, it has established an incorrect and dangerous precedent by holding that the provisions of state laws are irrelevant to a plaintiff's first amendment claim.

A perusal of the instructions submitted to the jury by the district court reveals that the jury was inadequately appraised on the issue of the applicability of Puerto Rico law to the case. The district court limited itself to summarizing the contentions of defendants (See Appendix D), and give a short summary of the Personnel Act provisions regarding the prohibition of personnel appointments during the electionary period. The jury received no specific instruction, and hence, no guidance as to the effect that, under Puerto Rico Law, non-compliance with the Personnel Act had over the appointments of plaintiffs. The jury had to be appraised that all appointments performed in breach of the provisions of the Personnel Act are null and void, and that the plaintiffs would be subject to summary dismissal if their appointments were illegal.

For the reasons stated above we believe, most respectfully, that the First Circuit erred in its appreciation of the adequacy of the jury instructions. Without the instruction on nullity of appointments requested by the defendants, the jury was left at odds regarding the authority upon which the defendants' actions were based. The jury never had a chance to understand that the source of the nullity of plaintiffs' appointments was not the defendants' whim, but valid provisions of Puerto Rico law which are binding on defendants. Thus, this is not a case in which the district court merely neglected to utilize the exact language requested by the defendants. The district court's omission of reading the nullity of appointments instruction requested constituted an egregious breach, which deprived the jury of a clear understanding of Puerto Rico law, and also deprived defendants of a fair trial.

Regarding the second reason for the First Circuit's finding regarding the jury instructions, the same is based upon that court's opinion in *Santiago-Negron*, *supra*. The same reasons adduced in this petition for questioning the validity of the statements contained in *Santiago-Negron* regarding the relevancy of state law in first amendment cases, are fully applicable in the context of the jury instructions. We therefore reiterate our argumentation of this issue, that is, that this holding is contrary to *Mt. Healthy*, and that it was against decisions issued by other Circuit Courts.

D. The Decision Reached By The Court Of Appeals In The Present Case Constitutes An Unwarranted Intrusion In The Legislative Process Of The Commonwealth Of Puerto Rico, Effectively Deleting Portions Of Valid State Law And Greatly Impairing The Choice Made By The Puerto Rico Legislature In Estabishing A Merit System For The Public Employment Sector.

As has been stated before in this petition, the laws that the Court of Appeals for the First Circuit has chosen to disregard

in this case are valid laws enacted by the Legislature of Puerto Rico. Vested with the mandate democratically accorded to it by the people of Puerto Rico the Legislature chose to establish the merit system as the principle that would govern the public employment sector in Puerto Rico, prior to the decisions of this Court in *Elrod* v. *Burns*, 425 U.S. 347 (1976) and *Branti* v. *Finkel*, 445 U.S. 507 (1980). In order to preserve the merit system, the Legislature adopted various strict provisions for recruitment, which, in conjunction with the Puerto Rico Civil Code, serve to protect the rights of those persons who freely choose to seek government employment.

Unfortunately, not all the government executives have chosen to comply with the strictures of the law, even though the law binds them to do so. In recruiting plaintiffs in violation of the Personnel Act, the former administration of the Municipality of Carolina, and the plaintiffs, violated the rights of many qualified people who would have obtained those positions had the law been complied with. However, under the decision of *Hiraldo-Cancel*, this situation may not be corrected by a new administration willing and bound to comply with the law, thus perpetuating, through judicial *fiat*, a gross illegality. Worse still, the choice of the people of PuertoRico, exercised through its elected representatives, to establish a merit system for its public employment sector, has been ignored and, for all practical purposes, deleted by the First Circuit. The concern which had been expressed by Mr. Justice Scalia in his dissenting opinion in *Rutan* v. *Republican Party of Illinois*, ____ U.S. ____, 110 S.Ct. 2729 (1990), that the federal courts could interfere with the democratic choices of the states regarding their personnel administration, has now become a reality in Puerto Rico, ironically, in the name of protecting the merit system. We submit, most respectfully, that such a result may not prevail.

Conclusion

This petition should be granted to review the decision below because it involves a paramount issue of state law regarding the nullity of government service appointments which do not comply with local personnel laws and regulations, and the court below has refused to consider it as the basis of a valid defense for the government under *Mt. Healthy*.

Respectfully submitted,

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APPENDIX A

NORMA IRIS HIRALDO-CANCEL, ET AL.,
PLAINTIFFS, APPELLEES,

v.

JOSE E. APONTE, ETC., ET AL.,
DEFENDANTS, APPELLANTS.

No. 89-1452.

UNITED STATES COURT OF APPEALS,
FIRST CIRCUIT.

Heard May 9, 1990.

Decided Feb. 4, 1991.

Carlos Lugo Fiol, Asst. Sol. Gen., with whom Jorge E. Perez Diaz, Sol. Gen., and Norma Cotti Cruz, Deputy Sol. Gen., were on brief, for defendants, appellants.

Jesus Hernandez Sanchez, with whom Hernandez Sanchez Law Firm, Santurce, P.R., was on brief, for plaintiffs, appellees.

Before SELYA, Circuit Judge, ROSENN*, Senior Circuit Judge, and CYR, Circuit Judge.

CYR, Circuit Judge.

The present dispute arose during the mayoral administration of Jose E. Aponte, Popular Democratic Party ("PDP"), who was elected Mayor of Carolina in the Puerto Rico General Elections of 1984. Soon after taking office, Mayor Aponte dismissed several municipal employees affiliated with the New Progressive Party ("NPP") and replaced them with PDP members. Eleven of the discharged employees commenced the present civil rights action under 42 U.S.C. § 1983 against Aponte and the Municipality of Carolina, claiming that their dismis-

*Of the Third Circuit, sitting by designation.

sals were politically motivated and effected in violation of their first and fourteenth amendment rights under the United States Constitution.

Following a ten-day jury trial, nine plaintiffs were awarded compensatory and punitive damages on their first amendment claims. The jury found for two of the plaintiffs on their procedural due process claims,[1] but awarded no damages. The district court ordered reinstatement of the nine prevailing plaintiffs and enjoined the defendants from further discriminatory treatment based on political affiliation. The district court denied defendants' motion for judgment notwithstanding the verdict, and defendants appealed.

I

[1-3] The first claim the defendants advance on appeal is that the only rational conclusion on the evidence[2] is that the plaintiffs would have been dismissed regardless of their political affiliation, as each was employed in violation of the Puerto Rico Public Service Personnel Act ("Personnel Act"), P.R. Laws Ann. tit. 3, §§ 1301-1431 (1988). Therefore, relying on Puerto Rico law and our decision in *Kauffman* v. *Puerto Rico Telephone Co.*, 841 F.2d 1169, 1173-74 (1st Cir. 1988) (career appointment null and void *ab initio* where made in violation of Personnel Act), defendants insist that there were legitimate grounds upon which each plaintiff could have been discharged, *viz.*, that their appointments were null and void under the Personnel Act. The defendants reach for refuge

[1] There are no due process claims involved in the present appeal.

[2] A judgment notwithstanding the verdict may be granted "only after a determination that the evidence could lead a reasonable person to only one conclusion," *Conway* v. *Electro Switch Corp.*, 825 F.2d 593, 598 (1st Cir. 1987), that the *moving party* was entitled to judgment. *Hendricks & Associates, Inc.* v. *Daewoo Corp.*, 923 F.2d 209, 214 (1st Cir. 1991); *Chedd-Angier Production* v. *Omni Publications International, Ltd.*, 756 F.2d 930, 934 (1st Cir. 1985). We review a denial of judgment n.o.v. *de novo*. *Daewoo Corp.*, 923 F.2d at 214-215; *Aggarwal* v. *Ponce School of Medicine*, 837 F.2d 17, 19 (1st Cir. 1988).

under the rule in *Mt. Healthy City School District Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), that a termination from government employment on account of constitutionally protected conduct may stand if the defendant can demonstrate that the plaintiff employee would have been terminated for legitimate reasons in any event. *Id.* at 285-87, 97 S.Ct. at 575-76.

Whether the present plaintiffs established by a preponderance of the evidence that their employment would not have been terminated absent their constitutionally protected political conduct — a question of fact, *see Doyle*, 429 U.S. at 287, 97 S.Ct. at 576; *Roure* v. *Hernandez Colon*, 824 F.2d 139, 141 (1st Cir. 1987) — was submitted to the jury as follows:

> [I]f you find from the preponderance of the evidence that the defendant had valid reasons to terminate plaintiff, you must find for defendant unless you find from the preponderance of the evidence that defendant would not have . . . terminated plaintiffs' employment but for their political affiliation.

The jury instructions given by the district court correctly articulate the "but for" test to be used in these cases. *See Cordero* v. *De Jesus-Mendez*, 867 F.2d 1, 6 (1st Cir. 1989).

The jury verdicts for plaintiffs were based on ample evidence that defendant Aponte (1) knew plaintiffs were affiliated with NPP, (2) vowed to rid the Carolina municipal government of NPP members, (3) gave instructions to "chop off the heads of the NPP members," and (4) told municipal employees to switch to the PDP. As the jury rationally found that plaintiffs would not have been discharged when they were, "but for" their political affiliation, the denial of the motion for judgment n.o.v. did not constitute error. *Conway* v. *Electro Switch Corp.*, 825 F.2d 593, 598 (1st Cir. 1987); *Reid* v. *Key Bank of Southern Maine, Inc.*, 821 F.2d 9, 15 (1st Cir. 1987).

II

[4] The second claim on appeal is that the district court erroneously refused to instruct the jury regarding null appointments under the Personnel Act. Although defendants concede that the personnel qualification requirements of Puerto Rico law cannot override a government employee's first amendment rights, *see, e.g., Santiago-Negron* v. *Castro-Davila*, 865 F.2d 431, 436 (1st Cir. 1989), defendants nevertheless insist that without the benefit of the requested instruction the jury was unable to assess the merits of their *Mt. Healthy* claim that plaintiffs, notwithstanding their political affiliation, would have been discharged in accordance with the Personnel Act.

Their claim cannot succeed, however, as the district court fully and accurately apprised the jury on defendants' Personnel Act claim, even spelling out defendants' contention for the jury. All the district court did not do was adopt the exact "nullity of appointment" language included in defendants' requested instruction, which is a matter of no determinative consequence. "[T]here is no requirement that the trial court instruct the jury in the precise form and language requested." *United States* v. *Passos-Paternina*, 918 F.2d 979, 984 (1st Cir. 1990). *See also Joia* v. *Jo-Ja Service Corp.*, 817 F.2d 908, 912 (1st Cir. 1987) ("While all parties are entitled to an adequate jury instruction upon the controlling issues, the court need not employ the precise language urged by any party."), *cert. denied*, 484 U.S. 1008, 108 S.Ct. 703, 98 L.Ed.2d 654 (1988).

Further, defendants' second claim founders for the same reason it failed in *Santiago-Negron*, a virtual mirror image of the present case: "We do not think that a new administration can use the 'nullity' of appointments doctrine as a cover for discharges, transfers, and discrimination based solely on political affiliation." *Santiago-Negron*, 865 F.2d at 436. There too the employment misadventure began shortly after the 1984 General Elections, when the new PDP mayor of Las Piedras proceeded to replace municipal employees affiliated with the

NPP, with PDP members. As here, the efforts of the defendants in *Santiago-Negron* to take cover under *Mt. Healthy* were rebuffed on the ground that "[t]he instructions given on the applicability of the personnel laws of Puerto Rico were . . . irrelevant to the first amendment claim." *Id.*

III

[5] The final contention on appeal is that the district court improvidently ordered reinstatement.[3] Before assessing the merits of defendants' contention, we note that reinstatement is an equitable remedy which is reviewed for abuse of discretion. *Rosario-Torres* v. *Hernandez-Colon*, 889 F.2d 314, 323 (1st Cir. 1989) (en banc). Considerable deference is accorded a reinstatement order, as the district court "has had first-hand exposure to the litigants and the evidence . . . [and] is in a considerably better position to bring the scales into balance than an appellate tribunal." *Id.*

Although not a presumptive entitlement in a section 1983 case, *see id.* at 322-23, we recognize that reinstatement may offer significant deterrent and curative value in appropriate cases. "If an employer's best efforts to remove an employee for unconstitutional reasons are presumptively unlikely to succeed, there is, of course, less incentive to use employment decisions to chill the exercise of constitutional rights." *Allen* v. *Autauga County Bd. of Educ.*, 695 F.2d 1302, 1306 (11th Cir.

[3] The June 30, 1988 reinstatement order provided as follows:

> "Because the evidence on political discrimination presented at trial was overwhelming, plaintiffs have established that injunctive relief is just and proper. Equitable relief is a component of a Section 1983 action. Accordingly, it is hereby ORDERED, ADJUDGED AND DECREED that defendants Jose Aponte and the Municipality of Carolina, their successors, agents, officers and any other person acting in concert with or on behalf of the defendants, reinstate plaintiffs to their former positions, at the same salary and with the same fringe benefits they would otherwise be receiving but for their termination. The reinstatement ordered herein shall be made forthwith and not later than ten days from the date hereof. . . ."

1982); *see also Banks* v. *Burkich*, 788 F.2d 1161, 1164 (6th Cir. 1986). Moreover, it may often be true, as the Eleventh Circuit has observed, that "[w]hen a person loses his job, it is at best disingenuous to say that money damages can suffice to make that person whole." *Allen*, 685 F.2d at 1306. "The psychological benefits of work are intangible, yet they are real and cannot be ignored." *Id.*

On the other hand, government operations may be burdened by a court-ordered reunion between employer and employee in the public sector, as a consequence of the hostile work environment that often attends revived antagonisms in the aftermath of litigation. Nonetheless, "such routinely 'incidental' burdens, in their accustomed manifestations, are foreseeable sequelae of defendant's wrongdoing, and usually insufficient, without more, to tip the scales against reinstatement when first amendment rights are at stake in a section 1983 action." *Rosario-Torres*, 889 F.2d at 322.

[6] The district court must proceed "beyond the incidental burdens which any reinstatement order might impose on a public employer," and balance the equities attendant upon whatever "special considerations" may be present in the particular case. *Id.* at 323. Notwithstanding defendants' contention that the district court in the present case did not weigh several "special considerations" in the balance, important countervailing equities favored reinstatement. Over the course of the ten day trial, the district court received compelling evidence of invidious political discrimination by the defendants. The court correctly concluded that the evidence of political discrimination was "overwhelming." Moreover, the record reveals that most plaintiffs were unable to secure employment following their dismissal.

The defendants further argue that reinstatement was precluded, as all plaintiffs were ineligible for appointment and their reinstatement contravenes the Personnel Act. Although plaintiffs' ineligibility for appointment would neither suspend their first amendment rights nor undercut their entitlement to

legal relief under section 1983, ineligibility considerations do bear on the appropriateness of the equitable relief of reinstatement.

As a practical matter, mere reinstatement may sometimes be a meaningless remedy where the government employer, under the aegis of valid personnel standards, is empowered to terminate reinstated employees as soon as they dust off their desks. Thus, where it appears that there is a strong possibility that a particular employee remains ineligible for appointment and therefore would be subject to nondiscriminatory termination, some courts consider reinstatement a disfavored remedy. *See, e.g., Lucas* v. *O'Loughlin*, 831 F.2d 232, 236 (11th Cir. 1987), *cert. denied*, 485 U.S. 1035, 108 S.Ct. 1595, 99 L.Ed. 2d 909 (1988). But even in such straitened circumstances, the trial court, not this court, bears the principal responsibility for assessing the efficacy of the equitable remedy in the particular case. *See, e.g., Santiago-Negron*, 865 F.2d at 437. This is especially true, we suggest, since reinstatement, even for a brief interlude, often affords ancillary benefit to the employee, such as increased seniority, and enhanced eligibility for pension vesting, which do not obtain as consequences of a traditional backpay award.

The defendants assert that several other factors militate against reinstatement in the present case; for example, that more than two years elapsed between plaintiffs' dismissal and their reinstatement, plaintiffs did not request interim reinstatement, and one plaintiff even obtained employment at a higher salary. The defendants stress that similar considerations contributed to our decision to affirm a denial of reinstatement in *Rosario-Torres*, 889 F.2d at 323-24. It is noteworthy, however, that our treatment of these considerations had an entirely different orientation in *Rosario-Torres*, where these same factors formed part of the basis for our conclusion that the district court *did not* abuse its discretion. By way of contrast, the present appellants contend that these factors suggest that the district court *did* abuse its discretion in ordering rein-

statement. Considering the breadth of discretion entrusted to district courts in the exercise of their equitable powers, *see, e.g., Rosario-Torres*, 889 F.2d at 323, we conclude that there was no abuse of discretion.[4]

Affirmed. We remand to the district court for an assessment and calculation of attorney fees on appeal.

---

[4] Following the ten day trial, defendants for the first time offered a federalism-based objection to the reinstatement order in support of their motion for judgment n.o.v.

> [T]he injunctive reinstatement granted to plaintiffs requires defendants to reinstate plaintiffs to positions where the evidence at trial clearly showed that plaintiffs did not qualify or compete for their positions. According to *Pennhurst State School Hospital* v. *Halderman*, 465 U.S. 89 [104 S.Ct. 900, 79 L.Ed.2d 67] (1984), a federal court lacks jurisdiction to order officials to enforce the law, much less propound an illegal act.

The district court denied the motion.

> Finally, defendants' assertion that *Pennhurst State School Hospital* v. *Halderman*, 465 U.S. 89 [104 S.Ct. 900, 79 L.Ed.2d 67] (1984), prevents this court from granting injunctive relief . . . is too frivolous to merit much elucidation. We reply only by borrowing Judge Bownes' words in *Cordero* v. *De Jesus-Mendez*, [867 F.2d 1, 20 (1st Cir. 1989)] . . . :
>
> We do not think *Pennhurst* applies. First, the basis of this action is not state law but alleged violations of the first and fifth amendments to the federal constitution. The reinstatement Order was remedial relief to which plaintiffs were entitled because their federal constitutional rights had been violated. . . .

As we observed in *Cordero*, 867 F.2d at 20, *Pennhurst* simply determined that the eleventh amendment precludes a federal court from enjoining compliance with *state law* by state officials. Thus, it is clear that defendants' *Pennhurst* argument, at best, adverted only obliquely to federalsim concerns. Accordingly, any more expansive federalism claim defendants would raise on appeal was not properly presented below, either before or after the entry of the reinstatement order. Moreover, even on appeal defendants have presented no developed argumentation based on federalism concerns relying instead on general references to the reinstatement criteria discussed in *Rosario-Torres*. Failure to develop a claim on appeal constitutes a waiver. *United States* v. *Zannino*, 895 F.2d 1, 17 (1st Cir.), *cert. denied*, ____ U.S. ____, 110 S.Ct. 1814, 108 L.Ed.2d 944 (1990).

APPENDIX B

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 89-1452.

NORMAN IRIS HIRALDO-CANCEL, ET AL.,
PLAINTIFFS, APPELLEES,

v.

JOSE E. APONTE, ETC., ET AL.,
DEFENDANTS, APPELLANTS.

BEFORE
Breyer, *Chief Judge*,
Rosenn*, *Senior Circuit Judge*,
and Campbell, Torruella, Selya Cyr, *Circuit Judges*

ORDER OF COURT
Entered: May 13, 1991

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestions for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc.

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:
s/ Francis P. Scigliano
Clerk.

[cc: Messrs. Lugo Fiol, Hernandez, Sanchez]

*Of the Third Circuit, sitting by designation.

APPENDIX C

Received & Filed
1988 Jun 13 AM 8:48
United States
District Court
San Juan, P.R.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 86-0274 (HL)

NORMA IRIS HIRALDO, et al.,
PLAINTIFFS,

v.

JOSE E. APONTE, ET AL.,
DEFENDANTS.

DEFENDANTS' PROPOSED JURY INSTRUCTIONS

To The Honorable Court:

Defendants, through their undersigned counsel submit the proposed jury instructions attached to this motion and listed herein.

Defendants reserve the right to amend or supplement their proposed instructions according to the course of trial.

Defendants also reserve the right to request the Court to require the jury to return a special verdict or a general verdict accompanied by answer to interrogatories under Rule 49(a) or 49(b).

I HEREBY CERTIFY that on this same date a true copy of this document has been sent by mail to: Jesus Hernandez Sanchez, Esq., First Federal Building, Suite 818, Stop 23, Ponce de Leon Avenue, Santurce, Puerto Rico 00908.

RESPECTFULLY SUBMITTED.
In San Juan, Puerto Rico, this 13th day of June, 1988.

HECTOR RIVERA CRUZ
Secretary of Justice

PEDRO A. DEL VALLE FERRER
Director
Federal Litigation Division

s/ LUIS N. BLANCO MATOS

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NULLITY OF APPOINTMENTS

Puerto Rican law establishes a series of mechanisms such as eligibility rosters, recruitment and selection procedures, competition requirements, taking an oath, etc. These requirements stem from the need of making the employee selection process as fair and equitable as possible in order to employ the best qualified persons. Under the applicable personnel regulations regarding selection of personnel, if those regulations are not followed, the appointments are illegal and void and said employees are subject to summary dismissals.

3 L.P.R.A. sec. 1333.
21 L.P.R.A. sec. 3354 (2)(f)
Moca's Personnel Regulations Article 6, Sections 6.9, 6.10
Del Rey v. *JACL*, 107 D.P.R. 348.
Guerra v. *Collazo*, 113 D.P.R. 50.
Colon v. *Alcalde Municipio de Ceiba*, 112 D.P.R. 740 (1982)

APPENDIX D

EXCERPTS OF TRANSCRIPT OF TRIAL PROCEEDINGS, JUNE 28, 1988

[69] Now, let us go to the specific issues in this case. I gave you the generality of a civil claim. Now let us go to a civil rights claim. Now, plaintiffs, eleven in total, claim to have suffered an injury as a result the deprivation on the color of local law of civil [70] rights and privileges secured to them by the Constitution of the United States, specifically plaintiffs claim that the action taken against them by the mayor and the municipality of Carolina, violated their first and fourteenth amendment rights under the United States Constitution regarding freedom of political association and expression. Plaintiffs claim that they were terminated in their employment because of their political affiliation. Both the mayor and the municipality of Carolina claim that they had the right to terminate plaintiff's employment as to those plaintiffs that work as career employees as like Norma Iris Hiraldo, Conde Garcia, Carmen Marquez, Luis Felipe Rodriguez, Judith Monzon Castro, Aura Iris Gonzalez, and Fermin Marengo Rios, the defendants claim that they were legally appointed and or did not meet the requirements for their respective position under the Personnel Law of Puerto Rico, and as to the transitory employees, four of them, Luis Felipe Rodriguez Iglesias, Gladys Hiraldo, Yolanda Allende Lind, and Yolanda Monzon, a contract employee, but for the purpose of this case, it doesn't make any difference, we can go for the general term of transitory employee, defendants claim that their appointments or contracts were not renewed because of the economic reasons, that they had valid reasons to terminate the [71] plaintiff, regardless of plaintiff's political affiliation.

* * *

[76] Defendant asserts that as to the three transitory employees and the contract employees, the reason for not renew-

ing their appointment or renewing the contract was due to economic or fiscal reasons wholly independent of plaintiff's political affiliation and that pursuant to defendant, lay-off and plaintiffs were terminated pursuant to seniority.

As to the career employees, defendant asserts that they are career appointments that were null and void pursuant to the Personnel Act. The law further provides that during the provision period, the VETA, as we call [77] it, a municipality cannot make personnel transactions, and that include among others, appointments, re-appointments, demotions, transfers, and changes in the employee's categories. This provision extends two months prior to the general elections until the second Monday in January, following the general election. That is two months prior and two months subsequent to the general elections.

The approval of the probationary period of an employee and his conversion to a career employee that fall within the general provision of no changes in category but the law also provides for exemptions from this provision. In order to prevail on the claim of political discrimination, that is on the First Amendment claim, plaintiff must establish that political affiliation was a substantial or motivating factor for not renewing their contract or appointments. To determine whether political affiliation was a motivating factor, evidence that plaintiffs belonged to one party and defendant to another without more, is not sufficient to establish political affiliation.

You must look, however, to all the evidence, direct and circumstantial to determine if political affiliation was a substantial or motivating factor for the non-renewals. Therefore, you look to the whole [78] evidence to make that determination.

Circumstantial evidence, I charge you, ladies and gentlemen of the jury, may be used to show discriminatory action against the plaintiffs and this is for the political discrimination cases. Hence, if you find that political affiliation was a motivating factor for dismissing plaintiff from their career position or for not renewing plaintiffs or to appoint or contract and if

you find that if it were not for plaintiffs' political affiliation, they would not have been terminated from their jobs, then you must find that defendant violated plaintiff's First Amendment right and are liable to plaintiff for damages. However, if you find that political affiliation was not the motivating factor for the termination of plaintiff from their career or transitory or contract jobs, then you must find that the defendant did not violate the plaintiff's First Amendment rights and are not liable to plaintiff for damages.

In other words, if you find from the preponderance of the evidence that defendant had valid reasons to terminate plaintiff, you must find for defendant, unless you find from a preponderance of the evidence that defendant would not have, would have not terminated plaintiff from their employment but for their political affiliation.

* * *

APPENDIX E

EXCERPTS OF TRANSCRIPT OF TRIAL PROCEEDINGS OF JUNE 28, 1988

[86] MR. BLANCO: All right, Your Honor, we also submitted one instruction as to nullity of appointment [87] which I don't think the court has read it.

THE COURT: Well, I don't think the evidence in this case warrants such an instruction.

MR. BLANCO: Very well, sir, I just wanted to get that in the record.

THE COURT: That is denied.

MR. BLANCO: That is all for us.

* * *

APPENDIX F

[Translation]

IN THE SUPREME COURT OF PUERTO RICO

No. R-78-230 Review

LUZ MINERVA ORTIZ ROSA,
PLAINTIFF AND APPELLANT,

v.

JOAQUIN ACEVEDO MORENO, MAYOR OF THE MUNICIPALITY OF AGUADILLA,
DEFENDANT AND APPELLEE.

MR. JUSTICE DIAZ CRUZ delivered the opinion of the Court.
San Juan, Puerto Rico, November 7, 1978

On July 1, 1976, the Mayoress of Aguadilla appointed Minerva Ortiz Rosa, appellant herein, director of the Barrio Higuey Geriatrics Center. Said appointment had "a provisional character, to be effective while your services are needed by this Administration." The monthly salary was of $425.00. In the General Elections held on November 2 of that year, Mr. Acevedo Moreno was elected Mayor. He was a member of a political party different from that of Mayoress Igartua de Suarez. On December 31, the mayoress who was to leave her seat made a new appointment to appellant Ortiz Rosa, this time "with a permanent character." Ortiz Rosa accepted the appointment on that same day. On February 14, 1977, the new mayor sent a letter of dismissal to the Director of the Geriatrics Center. He alleged that the appointment was nuil since it was made in contravention to Art. 4.7 of the Puerto Rico Public Service Personnel Act.

The dismissed employee filed a petition for mandamus against the mayor before the Superior Court, Aguadilla Part, challenging the dismissal on the grounds that it was made

without preferment of charges, without hearing, and without just cause. She also alleged political discrimination, and demanded to be immediately reinstalled in her position with back pay. After a trial on the merits, the Superior Court dismissed the complaint.

Pursuant to the due process for dismissing employees provided by art. 93 of the Municipal Act (21 L.P.R.A. § 1553), to our decision on the tenure of municipal employees in *Bezares* v. *Gonzalez, Mayor*, 84 P.R.R. 450 (1962), and in view of the possible impact of sec. 4.7 of the Personnel Act (Act No. 5 of October 14, 1975) where it prohibits the appointing authority from intervening with the personnel for two months before and two months after the General Elections, we accepted the employee's appeal and issued the writ of review.

[1] By the time appellant received the "provisional" appointment — July 1, 1976 — the Public Service Personnel Act, Act No. 5 of October 14, 1975 (3 L.P.R.A. § 1301 *et seq.)* was not yet in force. In its sec. 10.7 it provided that except for matters related to the organization of the Office, the other provisions should take effect, "once the regulations necessary to enforce [the] Act are approved and promulgated, which shall be done within a period of no more than twelve months from the approval thereof." Said regulations became effective before December 31, 1976. The appointment was governed by art. 91 of the Municipal Law (21 L.P.R.A. § 1551) which provides that appointments made by the mayor would be for a probationary period of six (6) months during which the mayor would evaluate the services rendered by the new employee, and if he should find during said probationary period that the services of the new employee were not satisfactory, then he could annul the appointment *at any time*, the provisions of art. 93 of the Act (21 L.P.R.A. § 1553)[1] — regarding hearing

[1] In its pertinent part, art. 93 of the Municipal Law provides that:

> "... The municipal officers and employees may be removed from office by the Mayor, for just cause, upon preferment of charges against them and upon the previous holding of a hearing set ten (10) days in advance ...."

and preferment of charges — not applying in such cases. *Cf. Leon* v. *Personnel Board*, 100 P.R.R. 350, 353 *et seq.* (1972).

We should presume that, during the probationary period, the employee showed that she was able to perform the duties of her position. Otherwise, she would not have been tenured on December 31, 1976. By that time, the Public Service Personnel Act, *supra*, was in full force. In its sec. 4.7 (3 L.P.R.A. § 1337) it provides that:

> For the purpose of guaranteeing the faithful application of the merit principle in public service during the period before and after elections, the authorities shall abstain from making any movement of personnel involving areas essential to the merit principle, such as appointments, promotions, demotions, transfers and changes in the category of the employees.
>
> This prohibition shall comprise the period of two months before and two months after General Elections are held in Puerto Rico. In the case of municipalities, it shall be understood that the prohibition extends until the second Monday of January after said General Elections.
>
> Exceptions may be made to this prohibition for urgent needs of the service, upon approval by the Director, pursuant to the standards established by the regulations.

[2] The permanent appointment made by the Mayoress meant a change in category made after the elections, which is one of the interventions with the personnel specifically barred by the above-copied sec. 4.7 during the two-month period running from November 6, 1976 to January 5, 1977.[2] It was

[2] Both appellant and the trial judge showed concern because the Mayoress could have avoided the prohibition since she held her position until January 9, 1977, and the two post-election months had expired on January 5. The Personnel Act was amended by Act. No. 49 of June 7, 1977, p. 105, adding the following to sec. 4.7: "In the case of municipalities, it shall be understood that the prohibition extends until the second Monday of January after said General Elections." This second Monday of 1977 fell on January the 10th.

not alleged or proved that the appointment was made as an exception, situation which is acknowledged by statute when there is an emergency in the public service. Therefore, the "permanent" appointment was spurious and devoid of judicial consequence, since it violated the express provisions of the Act.

[3-5] The prohibition contained in the above-cited sec. 4.7 is the safeguard par excellence of the merit principle governing the public service,[3] a restraining measure enacted to cover the four months during which — as political passions reach their climax — human weakness, translated into kindness for the partisans and in retaliation against the adversary, may determine changes in personnel foreign and contrary to the fundamental principle. *Cf. Hermina Gonzalez* v. *Srio. del Trabajo*, 107 D.P.R. 667 (1978). It was not proved, nor even suggested, that the Mayoress of Aguadilla had made a political favor in appointing appellant with a permanent character. Nevertheless, the presumption that the duties of a position have been duly performed (art. 102(15) of the Law of Evidence — 32 L.P.R.A. § 1887(15)) does not protect her action, since, there is no doubt that the law was not complied with. The severity of the prohibition, evinced in the transparent language of the statute, is not weakened by the good intentions of the appoint-

[3] Article 2. — Statement of Public Policy (3 L.P.R.A. § 1311):

"The public policy of the Commonwealth of Puerto Rico with regard to the public service personnel is as hereinbelow set forth:

"(1) To establish merit as the principle that shall govern the entire public service, so that it is the fittest who serve the Government and that every employee be selected, trained, promoted and retained in his employment in consideration of his merit and ability, without discrimination by reason of race, color, sex, birth, age, origin or social condition or political or religious ideas.

"(2) To the end of assuring the extension and strengthening of the merit principle to all sectors of the Puerto Rican public service, all public employees, whether Commonwealth, municipal or public corporation employees, shall be covered by a single personnel system, established to enforce the merit principle and which shall be known as the Public Service Personnel System."

ing authority.[4] The prohibition is only flexible in cases where there is an urgent need in the public service, but such flexibility is conditioned by the previous approval of the Director of Personnel and should comply with the norms set forth in the Regulations.[5] The appointment challenged never did satisfy the exception of the prohibition, and it is void because it was performed against the provisions of the law. Article 4, Civil Code (31 L.P.R.A. § 4).

The judgment reviewed shall be affirmed.

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[4] Art. 20 of the Civil Code (31 L.P.R.A. § 20):

> "When, in order to prevent fraud or from other motives of public utility, the law declares certain acts void, its provisions shall not be dispensed with or left unperformed on the ground that the particular act in question has been proved not to be fraudulent or contrary to the public good."

[5] After copying paragraphs No. 1 and 2 of Sec. 4.7 of the Act, Article II of the Rules and Regulations of the Public Personnel Administration Office explains that:

> "This prohibition shall be absolute, with the exception of those transactions of personnel in which to abstain from carrying them out will adversely affect the service rendered in the essential programs.
>
> "Every exception must be previously authorized by the Director. In the application to the Director there must be indicated the adverse effects that should be avoided through the exception."

LRC/hvp

APPENDIX G

§ 1333. Recruitment and selection

The Central Administration and each Individual Administrator shall give an opportunity to compete to any qualified person interested in participating in the public functions of the country. This participation shall be established in consideration to merit, without discrimination by reason of race, color, sex, birth, age, origin or social condition or political or religious ideas.

The general provisions which shall govern the recruitment and selection of career personnel shall be the following:

(1) Recruitment norms shall be established for each class of position aimed at attracting the best available personnel to the public service. The norms shall include the minimum requirements to hold positions based on the qualifications established in the class specifications, as well as the type of examination and of competition. The requirements shall be periodically revised to reflect the changes in the employment market and other conditions.

(2) The opportunities of employment shall be published through the most adequate means of communication in each case, and in such manner as to reach the sources of manpower, as may be established by regulation.

(3) The following general conditions are established for entrance into public service: to be physically and mentally able to perform the duties of the position; not to have been guilty of misconduct; not to have been removed from the public service; not to have been convicted of a felony or any offense entailing moral turpitude; and not to be addicted to the habitual and excessive use of controlled substances or alcoholic beverages. These last four conditions shall not apply when the applicant has been rehabilitated.

(4) Every person who is appointed to a position in the public service shall meet the minimum qualifications established for the class of position.

(5) The recruitment shall be carried out through a process whereby the applicants to positions may compete on an equal footing through the taking of tests for each class, such as written, oral, physical and performance tests and the evaluations of experience and preparation.

(6) To be eligible every testee must obtain the minimum rating in the test. This rating shall be established by Central Administration Office or the Individual Administrators, as the case may be.

(7) Any testee may request review of the result of his test.

(8) The names of the passing testees placed in strict descending order of ratings shall constitute a list of eligibles for the class tested.

(9) Vacancies shall be filled by a process of selection which shall include the following stages:

(a) Certification of the number of eligibles that may be determined by regulations, which shall not be more than ten, in their corresponding turns in the list of eligibles. The Office in the case of the Central Administration, and each appointing authority in the case of Individual Administrators, shall determine the number of eligible persons to be certified.

(b) Selection by the appointing authority of one of the certified candidates within a reasonable limit of time which shall be determined by regulation.

(c) Satisfactory completion of the probationary period established for the type of position. The probationary period shall comprise a complete cycle of the duties of the position and shall be of not less than three months nor more than one year's duration, except in those agencies where the organic or special laws in force provide or authorize a probationary period of different duration in accordance with a more extensive work cycle due to the special nature thereof.

(10) Upon satisfactory completion of the probationary period the employee shall become a regular career employee.

(11) Special procedures for recruitment and selection may be established by regulations in the following cases:

(a) When there is no appropriate list of eligible available for certain classes of positions and the urgency of the service to be rendered justifies it.

(b) For skilled or semi-skilled workers' positions.

(c) To guarantee equal employment opportunity to participants in training and employment programs, in order to comply with the goals of such programs.

(12) Persons appointed to positions of fixed duration shall have a transitory status. The duration of these appointments shall correspond to the period for which the position is created. Transitory appointments to permanent positions may be made as determined by regulations. The examinations for persons to be recruited for transitory appointments or for unskilled or semi-skilled positions shall consist of an evaluation for the sole purpose of determining if they meet the minimum requirements.

(13) Applications may be rejected, tests cancelled, eligibility in lists annulled, and applicants declared ineligible for public service if they do not meet the qualifications required or have committed or attempted to commit deceit or fraud in the information submitted. The above, in the case of public employees, can give rise to dismissal or the imposition of any other disciplinary measure.

(14) The regulations shall provide for the cancellation of lists when they do not meet the needs of the public service and shall require that the cancellation be notified in writing to the applicants appearing therein.

(15) The Director in the case of the Central Administration, and each appointing authority in the case of Individual Administrators, may authorize selective certifications when the special qualifications of the positions require it, or the applicants have expressed their preference, in writing, to work in a specific town or agency.

(16) The personnel comprised in the confidential service, as defined in section 1350 of this title, shall be freely selected and shall fulfill the requirements as to education, experience and any others that the appointing authority deems indispensable for the adequate performance of the duties thereof.

P.R. Laws Ann. tit. 3 § 1333.